

Maine Water Quality Standards
Overview for Office of Water Senior Leadership
June 2017

Issue Summary

- In 2015, EPA approved and disapproved a number of Maine water quality standards (WQS) under Clean Water Act (CWA) section 303(c). Maine sued EPA over the disapprovals and one of the approvals, and the litigation is pending. EPA subsequently finalized a federal promulgation to remedy the disapprovals when Maine did not do so.
- In February 2017, EPA received two petitions, one from the Maine Governor and the other from three dischargers in Maine, to reconsider the disapprovals and federal promulgation. On May 18, 2017, the Penobscot Nation submitted a letter opposing the petitions for reconsideration.
- The court recently granted a 90-day stay of the litigation to allow EPA time to familiarize decision-makers with the rule, litigation, and petitions, and determine whether to reconsider its actions in light of the petitions. The court ordered the parties to file a joint status report by August 10, 2017.
- This paper provides background and an overview of the key issues raised in the litigation and petitions to prepare decision-makers for a subsequent discussion of options.

History of Maine WQS Actions

Jurisdiction over Tribal Waters in Maine

- There are four federally recognized Indian tribes in Maine. The Penobscot and Passamaquoddy are the “Southern Tribes,” and the Houlton Band of Maliseet Indians, and Aroostook Band of Micmacs are the “Northern Tribes.”
- Waters in Indian lands (i.e., waters in the tribes' reservations and trust lands) are a small fraction of all the waters in Maine. (See Appendix A for map.)
- In 1979 Maine enacted the Maine Implementing Act (MIA), which embodied an agreement reached between the state and two of the four tribes (the Penobscot Nation and the Passamaquoddy Tribe). Congress later ratified MIA in the federal Maine Indian Claims Settlement Act (MICSA).
- Pursuant to subsequent amendments to MIA and MICSA as well as additional state and federal legislation (all referred to collectively as the “settlement acts”), the state and all four tribes have entered into agreements codified in state law and ratified by Congress in federal statutes that address numerous issues governing the relationship between the parties and, among other things, their uses and regulation of various natural resources.
- As federal statutes enacted by Congress, Indian settlement acts like MICSA are binding on the federal government in the same manner as other federal laws. Where federal settlement acts address tribal uses of natural resources, such as rights to take fish, they are in many ways similar to federal Indian treaties that reserve similar rights to tribes.
- Under established principles of federal Indian law, states generally lack civil regulatory jurisdiction within Indian country. In light of this basic jurisdictional divide under federal law, EPA’s longstanding approach across our programs calls for any state seeking to regulate in Indian country under our statutes to expressly demonstrate its authority to do so. EPA must find that the state has jurisdiction and expressly approve a state’s program as applied to Indian country for the program to apply in such areas. Prior to 2004, EPA approved Maine’s

WQS without any express reference to, or consideration of, waters in Indian lands. To ensure clarity in the scope of the approvals, between 2004 and 2015, EPA explicitly limited its approvals of state WQS to state waters outside of Indian lands and refrained from taking any action on the WQS for waters in Indian lands because Maine had not yet affirmatively demonstrated its jurisdiction over tribal waters for purposes of administering a WQS program. Note: EPA had previously approved Maine's jurisdiction to issue CWA permits in tribal waters. That action, which was the subject of litigation, did not directly address the WQS program. See *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007) (finding that the State has jurisdiction to issue NPDES permits to dischargers in tribal territories).

- In 2013, Maine submitted WQS for EPA review and expressly requested approval in all state waters, including waters in Indian lands. In 2014, Maine commenced a lawsuit seeking to compel EPA action on its WQS submission. Maine asserted that in MICA, Congress granted the state the authority to set WQS in the tribes' lands. The tribes disagreed with that assertion.
- After careful review and an opportunity for public comment, EPA concluded that under the unique jurisdictional formula enshrined in the settlement acts, the state has authority to set WQS in the waters on the tribes' lands. EPA next evaluated whether the state's WQS met CWA requirements as applied to the tribes' waters.

Evaluation of Maine's WQS Under the CWA (see Appendix B for CWA background)

- In a February 2015 written legal opinion from the Solicitor of the U.S. Department of the Interior (DOI) to EPA, DOI concluded that all four tribes in Maine have federally-protected sustenance fishing rights under the settlement acts. DOI also analyzed whether the tribal reserved fishing rights include subsidiary rights to sufficient water quality and concluded that "fundamental, longstanding tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right."
- Although EPA concluded that the state has jurisdiction to set WQS in the tribes' waters, EPA also concluded, based in part on the DOI legal opinion, that the settlement acts reserve rights for the tribes in Maine to fish for their sustenance in their waters. EPA determined that those rights either constitute (in some waters) or inform (in others) the "designated uses" of the tribes' waters that must be protected under the CWA.
- EPA thus harmonized the CWA with these reserved rights by interpreting the state's fishing use to mean sustenance fishing for the waters in Indian lands of all four tribes located in Maine. EPA also approved a provision in MIA as an explicit sustenance fishing designated use, separate from the state's general fishing designated use, in the Penobscot and Passamaquoddy reservations.

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- In 2015, EPA took a suite of actions in several increments:
 - Approved Maine's designated uses and almost all of Maine's aquatic life criteria as applied to waters in Indian lands.
 - Disapproved the majority of Maine's HHC for waters in Indian lands on grounds that the HHC were not adequately protective of the sustenance fishing use. EPA concluded that the state's standards were not adequately protective because they relied upon the state-wide FCR of 32.4 g/day (approx. 1 oz.), rather than a FCR appropriate for a tribal sustenance fishing designated use.
 - Disapproved six additional WQS for waters in Indian lands (recreational and shellfishing bacteria criteria to protect human health, and a clarification that natural conditions provisions cannot be applied to HHC; mixing zone policy; aquatic life criteria for ammonia, pH, and tidal temperature) because they were not based on the latest science and were not protective of applicable designated uses.
 - Disapproved two WQS state-wide (DO and a provision waiving WQS in event of an oil spill) and one WQS only for Maine waters outside of Indian lands (phenol criteria to protect human health) because they were not based on the latest science and were not protective of applicable designated uses.
- Maine did not move forward to remedy EPA's disapprovals, despite EPA's offers to work with the state.

EPA's Rulemaking

- Because Maine did not remedy EPA's disapprovals, leaving the gap in protection for Indian country and keeping downstream waters at risk, EPA proposed federal WQS, as required under the CWA, for Maine on April 11, 2016, including 96 HHC applicable to tribal waters. The proposal included an Administrator's Determination under the CWA that revised HHC were necessary to protect the sustenance fishing designated use.
- After responding to comments on EPA's proposed rule, in December 2016, EPA promulgated final federal WQS in Maine. EPA promulgated the HHC for tribal waters using a FCR of 286 g/day from the Wabanaki study.
- EPA's economic analysis for the rule showed that only one discharger may need a more stringent permit limit as a result of EPA's promulgation of the 96 HHC, with an estimated compliance cost of \$28,000-\$43,000 per year.
- The majority of estimated costs associated with EPA's rule are unrelated to the HHC or issues of tribal sustenance fishing and derive instead from disinfection requirements for 14 dischargers to comply with year-round recreational criteria (estimated at a combined

\$185,000-\$705,000 per year), and for one discharger to comply with the promulgated mixing zone policy (estimated at \$1,000-\$273,000 per year, depending on whether revisions to permit conditions are actually needed as a result of the policy).

- On January 18, 2017, the WQS became effective for CWA purposes.

Litigation and Petitions (see Appendix C for additional litigation and petition details)

- In the litigation, Maine has challenged our Feb 2015 disapprovals of the HHC and approval of the explicit sustenance fishing use, but not all of the other disapprovals and not the ensuing federal promulgation. The petitions for reconsideration, however, cover the full breadth of EPA's decisions and actions, save for the determination that Maine has jurisdiction to set WQS in waters in Indian lands.

Next Steps

- Options briefing in mid-July.
- The status report the parties file by August 10 should indicate whether EPA intends to reconsider some or all of its actions.

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Appendix A – Map

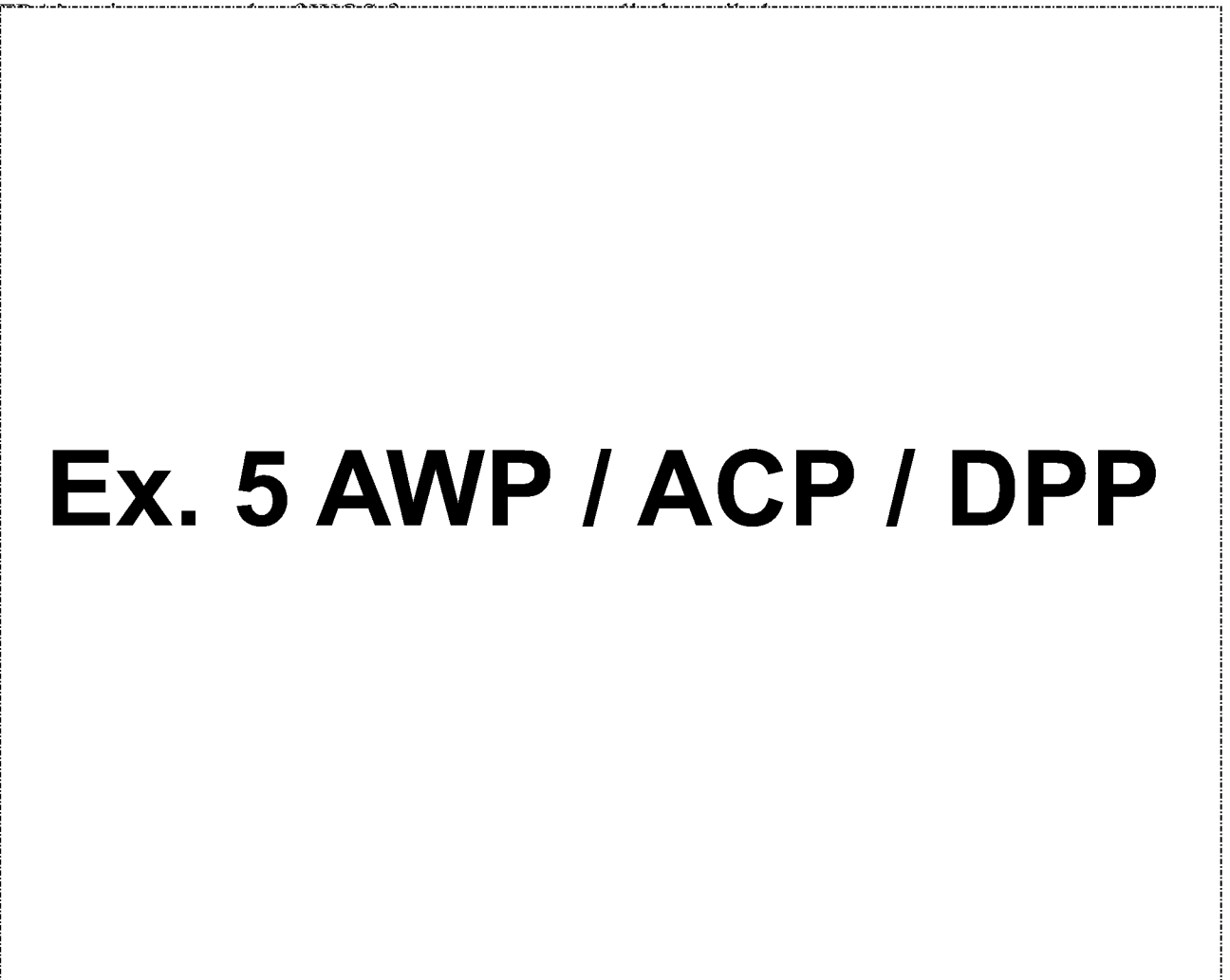
Appendix B – General Clean Water Act Background

- The objective of the CWA, as provided in CWA section 101, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve that objective, in CWA section 101(a)(2) Congress declared the national goal of achieving water quality that "provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." These are commonly referred to as the "fishable/swimmable" goals of the CWA.
- CWA section 303(c) directs states and tribes to adopt WQS for their waters subject to the CWA. Under CWA section 303 and EPA's implementing regulations at 40 CFR part 131, WQS consist of designated uses (e.g., protection and propagation of fish, shellfish, and wildlife; recreation in and on the water), water quality criteria (numeric levels or narrative statements describing a quality of water sufficient to protect applicable designated uses), and antidegradation requirements (to preserve water quality better than necessary to protect uses).
- CWA section 303(c)(2)(A) requires WQS to protect the public health and welfare, enhance the quality of water, and serve the purposes of the Act. EPA interprets the "fishable" uses under section 101(a) of the CWA to include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish. In other words, "fishable" means that not only can fish and shellfish thrive in a waterbody, but when caught, can also be safely eaten by humans. This interpretation satisfies the CWA section 303(c)(2)(A) requirement that WQS protect public health.
- EPA's regulations at 40 CFR 131.11(a)(1) provide that "[c]riteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use."

- To protect people from cancer and non-cancer effects from pollutants in drinking water and fish and shellfish, states must establish human health criteria (HHC) for their waters that are designated for such uses. EPA developed guidance, EPA's 2000 Human Health Methodology, for states and tribes to use in developing HHC. The Methodology contains recommendations regarding the various input factors that are used in setting HHC, e.g., fish consumption rates.
- Any new or revised WQS must be submitted to EPA for review and approval or disapproval. If EPA disapproves a state or tribe's new or revised WQS, the CWA provides the state or tribe 90 days to adopt a revised WQS that meets CWA requirements, and if it fails to do so, EPA shall promptly propose and then within 90 days promulgate such standard unless EPA approves a state or tribe's replacement WQS first.
- CWA section 303(c)(4)(B) authorizes the Administrator to determine that a new or revised WQS is necessary to meet CWA requirements. Upon making such a necessity determination, the CWA specifies that EPA shall promptly propose, and then within 90 days promulgate, any such new or revised standard unless prior to such promulgation, the state or tribe has adopted a revised or new WQS that EPA approves under the CWA.

Appendix C – Additional Details on Litigation and Petitions

In its lawsuit, Maine asserts that:

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Additional Issues Raised by the Petitioners

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